Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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**No. 76-1689**

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H. R. MORGAN, INC., and UNITED STATES FIDELITY AND GUARANTY CO., *Petitioners*

v.

UNITED STATES OF AMERICA, for and on behalf of MISSISSIPPI ROAD SUPPLY CO., *Respondent*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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H. R. Morgan, Inc. ("Morgan") and United States Fidelity and Guaranty Company ("USF&G"), petitioners, have filed a petition for writ of certiorari with this Court. Respondent, United States of America for and on behalf of Mississippi Road Supply Co. files this response to the petition and says that the petition should not be granted by this Court because the decision of the Fifth Circuit (1) is not in conflict with any decision of any other court of appeals or any decision

of this Court; (2) involves an interpretation of the language of a specific payment bond consistent with Mississippi bond law standards; and (3) does not have wide application or impact outside the interpretation of the specific terms of the bond.

## I.

## OPINIONS BELOW

The opinions below are adequately set forth in the petition.

## II.

## JURISDICTION

The statement of jurisdiction is adequately set forth in the petition.

## III.

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The statement of constitutional provisions, statutes and regulations is adequately set forth in the petition.

## IV.

## QUESTIONS PRESENTED

Whether the decision of the Fifth Circuit is correct in finding federal court jurisdiction under 28 U.S.C. § 1352.

Whether or not the Fifth Circuit decision conflicts with any decision of this Court or any court of appeals.

Whether the decision of the Fifth Circuit is in conflict with state law as it relates to interpretation of the specific language and coverage of payment and performance bonds.



## V.

## STATEMENT OF THE CASE

Except where noted below, the statement of the case made by petitioners adequately states the background facts of the case.

In footnote 1 of the statement of the case petitioners state that respondent never contended that Chata was anything but a private non-profit Mississippi corporation. In fact, respondent argued at every stage of this litigation that the federal court had jurisdiction under the Miller Act because the federal involvement in the project was so pervasive that Chata was the instrumentality of the United States. *U.S. ex rel Gamerston & Green Lumber Co.* v. *Phoenix Assurance Co.,* 163 F. Supp. 713 (N.D. Cal. 1958). However, since the lower court's decision was based on § 1352, and not the Miller Act, the status of Chata is not particularly important.

Petitioners make the point on page 5 of the petition that the contract between H. R. Morgan, Inc. and Chata was made before the effective date of a certain Economic Development Administration regulation requiring a payment and performance bond. This is irrelevant to the questions presented to this Court because the Fifth Circuit did not base its finding of federal jurisdiction on the EDA regulations cited by petitioners, or any other EDA regulation.

Petitioners fail to mention in their statement of the case that the land on which the project in question was constructed *was and is owned by the United States.* In fact, the first time the case was heard by the Fifth Circuit the court specifically remanded with directions

that the lower court make a factual determination as to who owned the land. Appendix C at 16a.[1]

Petitioner's statement of the case might give the Court the impression that the respondent had never asserted jurisdiction under 28 U.S.C.A. § 1352 prior to the remand of the Fifth Circuit. In fact, shortly after the complaint was filed it was amended by respondent to allege jurisdiction under three alternative jurisdictional grounds, Miller Act 40 U.S.C.A. § 270(a) and § 270(b); 28 U.S.C.A. § 1352 and 28 U.S.C.A. § 1337. Of course, the Fifth Circuit decision is based upon § 1352, which gives the federal court original jurisdiction of any action on a bond executed under any law of the United States.

The last paragraph of the statement of the case by the petitioners implies that the Fifth Circuit interpreted the U.S.F.&G. payment bond under principles of federal common law, without regard to Mississippi bond law. This is not the case and, in fact, the Fifth Circuit's interpretation of the specific language of the payment bond is the same interpretation that would have been reached had the case been considered by a Mississippi court.

## VI.

## ARGUMENT

### A.

### THE FIFTH CIRCUIT DECISION IS CORRECT

The Fifth Circuit decision did not deprive the petitioners of due process under the Fifth Amendment.[2]

[1] Except where otherwise noted in n. 7, reference is made to the appendices attached to the petition.

[2] The theory that petitioners now argue that they were deprived of property without due process of law in violation of the Fifth Amendment was *never* presented to the district court or the Fifth Circuit. This theory is now used by petitioners in a roundabout way to attack the basis of federal jurisdiction, i.e., that the bond was executed pursuant to federal law. Argument based on an alleged deprivation of Fifth Amendment rights is improperly raised for the first time here and should not be considered by the Court. *Mitchell* v. *Louisiana*, 350 U.S. 91 (1958); cf. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, reh. den. 389 U.S. 889 (1967).



Petitioners assert that the payment bond in question was not a bond required by federal law, and therefore that the federal court never had jurisdiction. In support of this theory, petitioners claim that they were deprived of due process under the Fifth Amendment because the bond which was required was the bond of Chata and not Morgan, and that the bond required by the federal regulation was a performance bond and not a payment bond. Second, petitioners claim they were deprived of due process because they had no notice of the terms of the lease agreement.

In answer to the first point it should be noted that the Fifth Circuit very carefully traced the § 1352 basis of federal jurisdiction in its opinion. The requirement of the bond came from 25 U.S.C. § 415, as amended (Supp. 1976), through its implementing regulation 25 C.F.R. § 131.5(c), which the court concluded was a valid legislative rule and possessed the force of law. *United States ex rel. Empire Plastics Corp.* v. *Western Cas. & Sur. Co.*, 429 F.2d 905 (10th Cir. 1970); *United States ex rel Victory Electric Corp.* v. *Maryland Cas. Co.*, 215 F. Supp. 700 (E.D. N.Y. 1963) and *Giancona* v. *Johnson*, 335 F.2d 372 (7th Cir. 1964). Appendix B at 8a.

25 C.F.R. 131.5(c) required that the Secretary of Interior see that a "surety bond" was furnished "guar-

anteeing" the "estimated construction cost of any improvement to be placed upon the land by the lessee." Appendix B at 3a. The statute and regulation were further implemented through ¶ 12(c) of the lease agreement between the Mississippi Band of Choctaw Indians and Chata which requires the lessee to "provide security which will guarantee completion of the improvement, and payment in full of claims of all persons for work performed in or materials furnished for construction." Appendix B at 4a.

The Secretary of Interior required a "surety bond" to guarantee the cost of improvements. The lease agreement required Chata to provide security to guarantee the completion of the project and payment of all persons for work and materials furnished. Chata was not the contractor, it was the owner lessee. Chata hired a general contractor, Morgan, to build the project. To comply with the federal regulation, Chata required payment and performance bonds from its contractor. A payment and/or performance bond from the contractor constructing the improvement is the only way, consistent with normal usage and procedure in the construction industry, that Chata could comply with the regulation. The federal regulation merely requires the guarantee of the estimated cost of any improvement. It does not, of course, say whether this is done by a performance bond or a payment bond, or both.[3]

[3] In fact, Chata (because of the federal regulation) required Morgan to provide both a payment bond and a performance bond. Exhibit P-1 Contract Documents & Specifications, Chata Industrial Parl Pearl River Indian Reservation, Neshoba County, Miss., Contract C—Water Sewer & Site Improvements—E.D.A.—Project No. 04-1-00836—December, 1971.



With respect to the second point of petitioners that they were denied due process because they had notice of the terms of the unrecorded lease agreement, the Fifth Circuit decision was based on the terms of the payment bond itself, and not the lease agreement. In fact the lower court used the language of the lease agreement primarily to show the direct link between the bond and the federal regulation which required it. Of course, U.S.F.&G. and Morgan were well aware of the terms of the payment bond and also that it was required by Chata. They were also well aware that this was a 100% EDA funded project on a U.S. Indian Reservation. As noted above, the language in paragraph 12(c) of the business lease merely implemented the federal regulation which required a surety bond to guarantee the estimated construction cost. Certainly part of guaranteeing the estimated construction cost is guaranteeing that all persons who supply material and labor going into the construction are paid.

B.

**THE FIFTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH ANY SUPREME COURT DECISON OR ANY OTHER COURT OF APPEALS DECISION**

Petitioners state that one of the reasons why certiorari should be granted in this case is because the decision of the Fifth Circuit creates a conflict between decisions of this Court, decisions of other courts of appeal, and a decision of the Fifth Circuit itself. However, this alleged conflict is based on the erroneous assumption that, by its decision, the Fifth Circuit "overrode" Mississippi bond law. As will be seen below, this was not the case. The result reached by the

Fifth Circuit is harmonious with Mississippi court decisions which have considered similar bond language.

The two decisions relied on by petitioners, *United States* v. *Yazell*[4] and the *Bank of America National Trust and Savings Association* v. *Parnell*[5] concern questions of whether federal common law should take precedence over a contrary state law rule, considering the degree of involvement of the federal government in the particular transactions. In both of these cases this Court said no.[6] Reliance on these decisions is inappropriate in the present case, which was decided on the specific language of the payment bond in light of state law and not on broad principles of federal common law.[7]

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[4] 382 U.S. 341 (1966).

[5] 352 U.S. 29 (1956).

[6] Petitioners also cited the landmark case of *Clearfield Trust Company* v. *United States*, 318 U.S. 363 (1943) in which this Court said that federal common law should prevail in a situation involving programs or actions which by their nature require uniformity and character throughout the nation.

[7] However, there was ample federal involvement in the construction of this project to warrant the application of federal common law principles to allow recovery by Mississippi Road. Although application of federal common law was not necessary because the language of the payment bond itself was broad enough to include Mississippi Road in its production, it is helpful to point out to the Court some examples of federal involvement:

(a) The lease contract covering the construction site lands, entered into between the Mississippi Bank of Choctaw Indians and Chata, a Mississippi non-profit corporation, whose members were all Choctaw Indians, was approved by the United States by its Department of the Interior. Appendix A at 1a. (References are to Appendix A attached to this response.)

(b) The lease is on a form provided by the United States Department of Interior and recognizes that the federal trust responsibilities with respect to the land should continue unless terminated



To illustrate the alleged conflict within circuits, petitioners cite *Rader* v. *Manufactures Cas. Ins. Co.*, 242 F.2d 419 (2nd Cir. 1957) and *United Bonding Ins.*

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by issuance of a fee patent. Appendix A at 6a, ¶ 13.

(c) The lease provided that all of the parties thereto and the Secretary of the Interior recognized the exceptional nature of the project embraced in part by the lease, "in that the lease does not relate to a mere real estate lease venture, but rather an important and valuable integral industrial-manufacturing business projected in a depressed labor area, with adequate provision contained in this lease for the preferential employment of enrolled members of the Mississippi Band of Choctaw Indians." Appendix A at 3a, ¶ 6.

(d) The lease provided that the rental shall be regularly reviewed and adjusted under 25 C.F.R. 131.8 by the Secretary of the Interior. Appendix A at 3a, ¶ 6.

(e) The said lease recognized the federal trust responsibility and provided that so long as the leased premises are in trust or restricted status, all of the lessee's obligations under the lease are to the United States. Appendix A at 8a, ¶ 21.

(f) The lease provided that no improvements may be constructed on the land except with the written consent of the United States. Appendix A at 4a, ¶ 11.

(g) The said lease provided that the United States shall have the right of inspection of the leased premises at all times. Appendix A at 7a, ¶ 17.

(h) The federal bureaus, agencies, and departments involved furnished the general plans and specifications for the construction. R. 34 to 37.

(i) The federal bureaus, agencies, and departments involved supervised and otherwise participated in the payment of the contractor, sub-contractors, laborers and materialmen. R. 36-37.

(j) The federal bureaus, agencies, and departments involved employed the engineer and otherwise supervised and participated in the construction of the project. R.36-37.

(k) The United States supplied all of the funds for the project and the total cost of the construction of the project was paid for by funds of the United States. R. 35-36.

(l) The said lease provided that the improvements shall become a part of the real property. Appendix A at 4a ¶ 11.

(m) Said lease provided that breach of the lease shall be acted upon in accordance with the Code of Federal Regulations, Title

*Co.* v. *Alexander,* 413 F.2d 1025 (5th Cir. 1969). Again, reliance on these cases by petitioners is misplaced. In *Rader,* the plaintiffs were suing on some agreements made at the same time as a bail bond, which was required by federal law. The court said that it had no § 1352 jurisdiction in a case where the § 1352 bond (which, in fact, existed) was *not* being sued on. The court said:

> Plaintiffs, by their present action attack the validity of the indemnity agreement dated November 30, 1949, the confession of judgment dated December 1, 1949 and the agreement of June 12, 1952. None of these were required to be executed by any law of the United States in connection with the giving of a surety bail bond. The various agreements under attack are collateral arrangements of the surety and indemnitors and were executed to afford protection to the defendant surety company and its agents and did inure to the benefit of the United States. 242 F.2d at 427.

Likewise, the Fifth Circuit's decision in *United Bonding* found that § 1352 could not be used as the basis of federal jurisdiction for a "subrogation" action

25, Part 131. Appendix A at 6a ¶ 15.

Respondent argued to the district court and the Fifth Circuit that the degree of federal involvement in this project (i.e. land owned by United States and project paid for 100% by United States) would support Miller Act jurisdiction and, concurrently, jurisdiction under § 1352. *Autrey* v. *Williams & Dunlap,* 343 F.2d 730 (5th Cir. 1965); *Lasley* v. *United States,* 285 F.2d 98 (5th Cir. 1960). Even if the lower court's ruling on the bond's coverage had been in conflict with state law, which it was not, the pervasiveness of the federal interest in this project, and other similar projects, would have justified the application of federal common law to insure the "payment in full of claims of all persons for work performed in or materials furnished for construction." Appendix A at 5a ¶ 12(c).



by a bonding company against certain employees of the post office department. The bonding company, which had executed a § 1352 fidelity bond, had voluntarily paid off (under the bond) for losses from alleged fraudulent activities of these employees and was attempting to bring a subrogation action against the employees to get its money back. The court said that an action under § 1352 had to be "on the bond" and that this subrogation and tort action against the employees was not on the bond which was required by a federal regulation. The other cases cited by petitioners in their brief[8] are likewise all based on the theory that the lower court applied a federal common law standard that was contrary to state law and are, therefore, inapplicable to this case.

Of course, the suit in this case is "on the bond" of U.S.F.&G. and Morgan, which was required by federal regulation. The existence of § 1352 jurisdiction could not be clearer.

### C.

### THE FIFTH CIRCUIT'S INTERPRETATION OF THE COVERAGE OF THE BOND WAS CONSISTENT WITH STATE LAW

As noted above, there can be no question of § 1352 jurisdiction in this case, in that the payment bond was required by federal law and that this actions is based on that bond.

Petitioners misconceive the importance of this case by terming it a landmark decision in the area of fed-

[8] *Highland* v. *Russell Car & Snow Plow Co.,* 279 U.S. 253 (1929); *Adams* v. *Greeson,* 300 F.2d 555 (10th Cir. 1962); *Maternally Yours* v. *Your Maternity Shop,* 234 F.2d 538 (2d Cir. 1956); and *Lvick* v. *Graybar Electric Co., Inc.,* 473 F.2d 1360 (8th Cir. 1973).

eral common law. The portion of the lower court's decision dealing with the "coverage" of the bond reveals that, quite to the contrary, it was based upon a reading of the specific language in the payment bond which was drafted by the surety. The lower court relied most strongly on and quoted from the payment bond itself, which secured "payment to all persons, firms, subcontractors, and corporations furnishing materials for or performing labor in the prosecution of work . . . including all amounts due for materials, lubricants, oil, gasoline, coal and coke, repairs on machinery, equipment, tools, consumed in connection with the construction of such work . . . and for all labor, performed in such work whether by subcontractor or otherwise . . . ." Appendix B at 9a.

While it is true that a private payment bond in Mississippi is not required by statute to extend payment protection to anyone who is not in privity with the prime contractor,[9] the bonding company is free to draft its payment bond to extend coverage to people not in privity with the prime contractor, like people who rent equipment to subs of the contractor and keep the equipment repaired. Likewise, the bonding company is free to include language in its bonds which will provide coverage for repairs on equipment and equipment rental. In Mississippi, when the language of the bond so extends its coverage then the bonding company is liable for the payment of these items. *Linde Air Products Co.* v. *American Surety Co.*, 168 Miss. 877, 152 So. 292 (1934); *Shuptrine* v. *Jackson Equipment & Service Co.*, 168 Miss. 464, 150 So. 795 (1933); and

[9] Miss. Code Ann. § 85-7-185 (1972); *Alabama Marble Co.* v. *United States Fidelity & Guaranty Co.*, 146 Miss. 414, 111 So. 573 (1927).



*Seaboard Surety Co.* v. *Bosarge*, 226 Miss. 482 84 So. 2d 517 (1956). On the other hand, when the language of the bond is not broad enough to extend the protection to people who provide equipment to a sub of the contractor and repair that equipment, the Mississippi court has held that the bond did not cover these items. *Carruth* v. *Standard Accident Ins. Co.*, 329 F.2d 690 (5th Cir. 1964). The lower court, basing its decision on the language of the bond itself, held that it protected the respondent.

Therefore, the decision of the Fifth Circuit in this case was consistent with the interpretation that would be given to the bond under Mississippi law by a Mississippi court. Even though there is federal jurisdiction because the bond was executed pursuant to a law of the United States, this does not mean that the lower court's interpretation of the specific language of the bond would have any far reaching significance or impact on a federal court considering the same type of situation, with different bond language, in another state. In most, if not all states, the language of the bond would control, especially when the bond language extended the coverage required by statute or rule of law in the state. This decision is particularly unsuited for certiorari because the decision in the case turned on such a unique and limited point i.e., the specific language of the U.S.F.&G. payment bond.

## CONCLUSION

The Fifth Circuit decision as to the coverage of the bond was not based on federal common law. To the contrary, the decision of the Fifth Circuit was based on specific bond language drafted by the surety, consistent with Mississippi bond law. The fact that the federal court had jurisdiction under § 1352 is clear because of the implementing regulation.

This case is not appropriate for certiorari.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
MISSISSIPPI BAND OF CHOCTAW INDIANS
PHILADELPHIA, MISSISSIPPI

### Business Lease Contract

THIS CONTRACT, made and entered into this 13th day of August, 1970, by and between the MISSISSIPPI BAND OF CHOCTAW INDIANS, acting through its duly authorized Tribal Chairman and Secretary (hereinafter called the Lessor), and CHATA DEVELOPMENT COMPANY, chartered December 7, 1969 under the State laws of Mississippi, with its principal place of business at Philadelphia, Mississippi (hereinafter called the Lessee), as provided in Tribal Council Resolution No. Cho. 55-69, adopted April 8, 1969 under and in accordance with the provisions of existing law and the regulations prescribed by the Secretary of the Interior in the Code of Federal Regulations, Title 25, Indians, Part 131, and any amendments thereto relative to leases on restricted Indian lands which by reference are made a part hereof.

WITNESSETH:

1. DEFINITIONS

(a) "Secretary" means the Secretary of Interior or his authorized representative.

2. PROPERTY LEASED

For and in consideration of the payment of the rents and other charges and the performance of all the covenants of this lease by the Lessee, Lessor hereby leases to the Lessee all of that certain property and rights, licenses,

privileges, easements and appurtenances thereto, thereon or created for the benefit thereof (collectivly referred to as "property"), which premises are legally described in that certain survey as: E½ NW¼ NE¼, Section 30 T. 11N, R 11E; and SE¼; SW¼ SE¼, Section 19, T. 11N, R.11E, 30 acres, m/l.

3. Term Of Lease

Subject to the terms and conditions herein, the property is leased for a term of twenty-five (25) years, beginning on the first day of the month following the date that this lease is approved by the Secretary of the Interior or his authorized representative, with an option in the lessee to renew for an additional period of twenty-five (25) years as hereinafter provided.

4. Renewal

This lease may be renewed at the option of the Lessee, pursuant to paragraph 3, at the expiration of the original term, for an additional period of twenty-five (25) years, under the same terms and conditions as expressed herein; provided, however, that notice of said option shall be given by the Lessee to the Lessor and the Secretary in writing at least six (6) months prior to the expiration of the original term of this lease.

5. Rental

Lessee agrees to pay to the Lessor as consideration for the use and occupancy of the above described property under this lease, rental as follows:

(a)

(b) In the event that lessee fails to pay any installment of any of the sums due hereunder as rental or otherwise for a period of thirty (30) days after the same becomes due, then, at the option of the Lessor,



all of the remaining installations due hereunder shall become due and payable at once, together with interest thereon at the rate of six percent (6%) per annum until paid in full.

6. Rental Adjustment

All parties hereto and the Secretary recognize the exceptional nature of the project embraced in part by this lease, in that the lease does not relate to a mere real estate lease venture, but rather an important and valuable integrated industrial-manufacturing business projected in a depressed labor area, with adequate provision contained in this lease for the preferential employment of enrolled members of the Mississippi Band of Choctaw Indians. All parties hereto and the Secretary agree that the rentals provided herein shall be subject to review and adjustment under 25 CFR 131.8 by the Secretary at not less than five year intervals.

7. Use Of Premises By Lessee

(a) Lessee shall use the property for the purpose of future product lines which may be added from time to time during the term of this lease. In view of the relatively long term and renewal term of this lease, the preceding sentence shall not be deemed to restrict or limit the bona fide business purposes for which the property be used; provided, however, that at no time shall Lessee's business upon the property omit noxious or dangerous odors or substances or constitute a nuisance.

(b) Lessee may install or cause to be installed vending machines in the building and in the employees cafeteria for dispensing of soft drinks, coffee, sandwiches, candy and cigarettes, etc.

8. Unlawful Conduct

The Lessee agrees that it will not use or cause to be any part of said property for any unlawful conduct or purposes.

9. Subleasing-Illegal Assignments-Transfers

No assignments or amendments of this lease or an interest therein may be made except with the approval of the Secretary and the written consent of all parties to this lease; provided, however, that Lessee shall have the right to sublet all or any part of the premises to any of its wholly-owned subsidiaries or subsidiaries in which it may own 66-⅔% or more of the voting stock.

10. Delivery Of Premises

It is understood and agreed that at the termination of this lease, by normal expiration or other wise, the Lessee shall peaceably and without legal process deliver up the possession of the premises herein described, inclusive of the improvements, in good condition, reasonable wear and tear, normal damage by the elements and acts of God excepted.

11. Improvements

(a) Lessee shall have the right to erect other buildings on the property at its own cost and expense with the written consent of the Lessor and approval of an authorized representative of the Secretary of the Interior as to the location and type of building to be constructed, said buildings to become part of the real property. Such approval will not be unreasonably withheld. Any construction should comply with local zoning laws and building codes.

(b) It is understood and agreed that the Lessor is relieved of any responsibility for the cost of repairs, alterations or remodeling of buildings, fixtures or equipment for operation of this business project.



12. Insurance Liability And Surety Bond

(a) The Lessee during the period of this lease shall at Lessee's expense keep in force and effect a public liability insurance policy providing for bodily injury and property damage in minimum limits of $100,000/$300,000 for personal injury and $100,000 for property damage, said policy to be written jointly to protect Lessor and Lessee in a company selected by Lessor and Lessee, and Lessee agrees to save and hold harmless the Lessor and the United States from any and all liability in excess of the amount of the policy.

(b) Lessee shall, from the date of aproval of this Lease carry fire insurance with extended coverage endorsements, and vandalism, pointly in the names of the Lessee and Lessor, covering the full insurable value of all improvements on the leased premises. Said policy or policies shall be deposited with the Secretary, and Lessee shall pay all premiums and other charges payable in respect to such insurer, and shall deposit with the Secretary the receipt for each premium or other charge as paid, or satisfactory evidence thereof. In the event of damage to any improvement on the leased premises, the Lessee shall reconstruct the improvement in compliance with applicable laws and building regulations and in accordance with plans to be approved by the Secretary. Such reconstruction shall commence within one (1) year after the damage occurs and shall be pursued diligently.

(c) Before commencement of construction of each improvement on the leased premises, Lessee agrees to provide security which will guarantee completion of the improvement, and payment in full claims of all persons for work performed in or materials furnished for construction. Lessee may provide said security by posting a

corporate surety bond in an amount equal to the cost of improvement, said bond to be deposited with the Secretary and to remain in effect until the improvement is satisfactorily completed. Said bond shall be conditioned upon the faithful performance of Lessee, and give all claimants the right of action to recover upon said bond in any suit brought to foreclose mechanic's or materialmen's liens against the property. Upon approval of this lease by the Secretary, the Lessee agrees to post a corporate surety bond in a penal sum of not less than one year's minimum rent.

13. Relinquishment Of Supervision By The Secretary

Nothing contained in this lease shall operate to delay or prevent a termination of Federal trust responsibilities with respect to the land by the issuance of a fee patent or otherwise during the term of the lease; however, such termination shall not serve to abrogate or modify the lease. The owners of the land and the lease shall be notified by the Secretary of any such change in the status of the land.

14. Interest Of Members Of Congress

No Members of, or Delegates to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this provision shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

15. Violation Of Lease

It is understood and agreed that unless otherwise provided herein violations of this lease shall be acted in accordance with the regulations in 25 CFR 131.



16. Assent Not Waiver Of Future Breach Of Covenants

No assent, express or implied, to any breach of any of the Lessee's covenants, shall be deemed to be a waiver of any succeeding breach of any covenants.

17. Inspection

Upon twenty-four (24) hours notice to Lessee, duly appointed representatives of the Lessor and of the Secretary shall be granted entrance to the property for the purpose of carrying on any inspection deemed necessary and reasonable to assure that reasonable protection, maintenance, fire and safety controls are in effect and the provisions of this lease are being complied with.

18. Maintenance

Lessee shall at all times at Lessee's own expense, keep all buildings, improvements, machinery and equipment on the leased property in a state of good repair and shall surrender said property at the end of the term in said condition, ordinary wear and tear, casualty and removal by virtue of obsolescence or disrepair excepted. Lessee shall be obligated to make all necessary repairs and replacements (whether of a minor or major nature) to maintain the property in the condition required above at Lessee's expense. Lessee shall comply with the laws, ordinances and regulations of the State, County and municipality wherein the property is located, with regard to sanitation, construction, licenses or permits to do business and all other matters.

19. Liens

The Lessee further contracts and agrees that all bills for labor and materials incurred in the construction of any buildings, or in the maintenance of the property shall

be paid promptly as the same becomes due and payable and that no mechanics', laborers', or materialmen's liens will be permitted to accrue.

20. Taxes And Utilities

Lessee further covenants and agrees to bear, pay and discharge, in addition to the rent herein reserved, all applicable taxes, assessments, charges and levies of every name, nature and kind, including water rents and charges for public utilities, which may be taxed, charged or assessed against said property, or upon any of the buildings or improvements thereof, or which may be levied or imposed upon the leasehold estate hereby created during the term hereinbefore granted.

21. Upon Whom Binding

It is understood and agreed that the covenants and agreements hereinbefore mentioned shall extend to and be binding upon the heirs, assigns, successors, executors, and administrators of the parties of this lease. While the leased premises are in trust or restricted status, all of the lessee's obligations under this lease, are to the United States as well as to the owner of the land.

22. Employees Preference

Subject to Lessee's rules for hiring and firing employees, a copy of which shall be filed and maintained with the Superintendent of the Choctaw Indian Agency, Lessee covenants and agrees that it will, in the hiring of 100% of its employees, give first preference to enroll members of the Mississippi Band of Choctaw Indians so long as and to the the extent that they are available, qualified and willing to work. Lessee will, to the extent and for such period it considers it necessary and practicable, participate in the Bureau of Indian Affairs' On-The-Job Training Program consistent with industrial



training standards in the particular industry for the purpose of training employees for specific jobs which it is anticipated will lead to full-time employment with the Lessee. Lessee further agrees to pay employees in accordance with provisions of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060). Giving first preference to employment of enrolled members of the Mississippi Band of Choctaw Indians is the purpose and essence of this lease contract.

23. Possession And Control Of Property

Providing the Lessee shall comply with all of its obligations herein, the Lessor covenants that Lessee shall freely, peaceably and quietly enjoy and have full possession and control of the property without molestation, hindrance, eviction or disturbance by Lessor or by any other person or persons acting under or through Lessor whomsoever, for the full term or any extension hereof. The Lessor will, upon the request of Lessee, but at the expense of Lessee, enforce any rights, claims or privileges against any third party accruing to Lessor as owner of the property and, in Lessee's discretion, necessary or desirable for the benefit of Lessee or the property.

24. Net Worth & Financial Statements

The Lessee agrees to require each sub-lessee a minimum tangible net worth the amount of which will be mutually agreed upon at the time the sublease is made. Fixed assets will be valued at cost and an inventory based on cost or market, whichever is lower. An annual audited financial statement will be furnished within ninety (90) days after the close of each fiscal year to the Lessor and to the Secretary of the Interior.

25. Must Be Approved

It is further understood and agreed between the parties hereto that this lease shall be valid and binding only after approval of the Secretary, or his authorized representative.

In Witness Whereof, This contract is executed by and on behalf of the Lessor by the signature of its Tribal Council Chairman and Secretary and by Lessee as of the day and year first above written.

Mississippi Band Of Choctaw Indians

By /s/ Emmett T. York (1)
Chairman

Attest:

By: /s/ Prentice Morris
Secretary

Chata Development Company

By: (Signed) Phillip Martin
Chairman

Attest:

By: (Signed) Robert C. Benn
Secretary.

Approved:

(Signed) John F. Gordon
Superintendent, Choctaw Agency